



## Criminal History Reviews of District Employees and Volunteers

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School districts are required by law to review the criminal histories of employees and other persons who have contact with students. The following FAQs summarize these requirements as they relate to school district employees and volunteers.

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### CRIMINAL HISTORY RECORDS AND THE FACT CLEARINGHOUSE

***Q: What is a criminal history record?***

A. The term *criminal history record* means different things in different contexts. No comprehensive database exists for all of the arrests, charges, indictments, convictions, and other adjudications in the United States. Instead, the nation's criminal record system consists of federal, state, and local databases.

The criminal history reviews required in Texas school districts involve either state criminal histories or national criminal histories:

- State criminal history records (*criminal history record information* or CHRI): CHRI is information collected by the Texas Department of Public Safety (DPS), a law enforcement or criminal justice agency, or a private entity, that consists of identifiable descriptions and notations of arrests, detentions, indictments, informations, and other formal criminal charges and their dispositions. Tex. Gov't Code § 411.082(2); 19 Tex. Admin. Code § 153.1101(4). These records are retrieved primarily based on the name of the individual, although some DPS searches use fingerprints. With the possible exception of reports from private agencies, these records include only data from Texas.

- National criminal history records (*national criminal history record information or NCHRI*): NCHRI consists of criminal history records from DPS and the FBI retrieved through fingerprint identification information. The FBI's records include data from Texas and other states. Tex. Educ. Code § 22.081(2); 19 Tex. Admin. Code § 153.1101(8).

In other words, CHRI refers to a state-wide, name-based or fingerprint-based criminal history and NCHRI refers to a national, fingerprint-based criminal history.

**Q. *What is the FACT clearinghouse?***

- A. The Fingerprint-based Applicant Clearinghouse of Texas (FACT) Clearinghouse is a repository of the DPS and the FBI fingerprint-based criminal history results. The FACT clearinghouse consists of the criminal history records of every individual subject to a national criminal history review, including school district employees. The FACT Clearinghouse allows a subscribed district access to the DPS and FBI criminal history fingerprint results, including an electronic subscription.

A district can subscribe to receive electronic notification if an employee's criminal history record changes—i.e., if the employee is arrested or charged with a violation of law subsequent to the initial background check. Only persons processed through Fingerprint Applicant Services of Texas (FAST) are eligible for FACT. FAST is a service of the DPS that provides the electronic capture and submission of fingerprints for a fingerprint background check. The subscription service notifies an entity of new activity to a Texas criminal history record only. The subscription now includes new activity to a criminal history record at the national level. See [DPS FACT Clearinghouse](#) for more information on the DPS FACT Clearinghouse system. See the [DPS Criminal Justice Information Services \(CJIS\) Launch Pad](#) for information about the Federal Bureau of Investigation (FBI) Civil Rap Back Program implemented through the FACT Clearinghouse.

**Q. *How does the fingerprinting process work?***

- A. DPS's vendor, IDEMIA, conducts all fingerprinting for purposes of school district criminal history reviews. The fingerprints are obtained digitally—ink and paper are no longer used. For certified employees and substitute teachers, most fingerprinting is done during scheduled visits to the district. Other employees must obtain a fingerprinting authorization (FAST pass) from the district and travel to one of the vendor's locations. The applicant or employee must have a state-issued photo identification in order to be fingerprinted. See [DPS Fingerprinting Services](#) for more information on the FAST pass system.

## PERSONS SUBJECT TO CRIMINAL HISTORY REVIEW

### ***Q. Which district employees and volunteers are subject to criminal history review?***

A. All school district employees are subject to mandatory criminal history review. The law applies to certified employees, noncertified employees, student teachers, and volunteers. It may be helpful to think of these requirements in as they apply to the following groups:

- certified employees and substitute teachers,<sup>1</sup>
- noncertified employees,
- student teachers and volunteers.

Tex. Educ. Code §§ 22.083-.0837.

### ***Q. Are districts required to check the criminal histories of school nurses and other licensed professionals?***

A. Yes. Nurses, psychologists, occupational therapists, and other licensed professionals fall under the rules for noncertified employees. Tex. Educ. Code § 22.0833. A licensed professional will have to submit fingerprints to DPS even if the person was previously fingerprinted for licensing purposes. 19 Tex. Admin. Code § 153.1109(a).

### ***Q. Is a district required to review the criminal history of every volunteer?***

A. No. A district must review the criminal history of a volunteer, or a person who has indicated in writing an intention to serve as a volunteer. Tex. Educ. Code § 22.0835(a)(2). There are, however, three major exceptions to the definition of *volunteer*:

- a parent, guardian, or grandparent of a student enrolled in the district where the person will perform the volunteer services;
- a person who will be accompanied by a district employee while on campus; and
- a person who is volunteering for a single event on a campus.

Tex. Educ. Code § 22.0835(e).

Although a district is not required to review the criminal history of persons covered by these exceptions, it may do so if it wishes. Tex. Educ. Code § 22.0835(f).

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<sup>1</sup> A *substitute teacher* is a teacher who is on call or on a list of approved substitutes to replace a regular teacher and who has no regular or guaranteed hours. A substitute teacher may be certified or noncertified. 19 Tex. Admin. Code § 153.1101(5).

***Q. Are employees of shared services arrangements—such as special education coops—subject to criminal history reviews?***

- A. Yes. Criminal history reviews are required for any employee of a shared services arrangement (SSA) whose duties are performed on school property or at another location where students are regularly present. Tex. Educ. Code § 22.0833(c).

**CRIMINAL HISTORY REVIEW PROCESS**

***Q. Which type of criminal history will be reviewed?***

- A. The type of criminal history that will be reviewed depends on the person’s classification:
- National criminal history: certified employees, newly hired noncertified employees, and substitute teachers are subject to a national (fingerprint-based) criminal history review. All SSA employees—certified and noncertified—are subject to national criminal history review.
  - State criminal history: student teachers, and volunteers are subject to a state (named-based) criminal history review. Also, noncertified employees hired before January 1, 2008 were only subjected to state criminal history review.

Tex. Educ. Code §§ 22.083-.0837.

***Q. Does an employee have to complete the criminal history review process before starting work?***

- A. The timing of the criminal history review depends employee’s classification:
- A student teacher or volunteer may not perform any duties until the district obtains the person’s criminal history. Tex. Educ. Code § 22.0835(d).
  - A noncertified employee offered employment on or after January 1, 2008 was required to submit fingerprints to DPS before starting work. 19 Tex. Admin. Code § 153.1109(d).
  - SBEC was required to obtain the criminal histories of certified employees and substitute teachers by September 1, 2011. Tex. Educ. Code §§ 22.0831(g), .0836(i).

***Q. May a district require an employee to pay the cost of obtaining a criminal history?***

- A. Yes. A district may require student teachers, volunteers, and substitute teachers to pay the costs of obtaining criminal histories. Tex. Educ. Code §§ 22.0835(g), .0836(f). Similarly, SBEC is required to charge fees to noncertified persons and substitute teachers for national criminal history reviews. Tex. Educ. Code § 22.0837.

If a district pays the fee for obtaining a criminal history, the district may require the individual to reimburse the district. Some districts arrange for reimbursement through payroll deductions. This is permissible, so long as the district provides advance notice of the deduction and the deduction does not result in a nonexempt employee's receiving less than minimum wage and any overtime for the pay period. Department of Labor Fact Sheet # 16, [\*Deductions from Wages for Uniforms and Other Facilities Under the Fair Labor Standards Act\*](#), July 2009. If necessary, a district may spread the deductions over several pay periods to avoid wage and hour concerns.

## DISQUALIFYING OFFENSES

### ***Q. What type of criminal history will make a person ineligible to work at a school district?***

- A. The law prohibits a person from working at a school district if the person has been convicted of certain offenses, described below (mandatory restrictions). SBEC may sanction an educator who does not discharge an employee if the educator knows or should have known, through a criminal history review, that the employee has been convicted of one of these offenses. Tex. Educ. Code § 22.085(e).

In addition, districts may adopt and enforce local eligibility standards. It is purely a local decision whether to hire a person who has a criminal history but who has not been convicted of one of the offenses listed in statute. TASB Legal Services recommends that districts consider adopting written local standards to ensure consistency and objectivity in decision-making. In adopting standards, districts may incorporate some or all of the following factors, which are based on those considered by state licensing agencies:

- Whether the crime is a felony or misdemeanor;
- The degree of offense (e.g., first, second, or third degree felony);
- The nature of the crime (e.g., assault, property crime, fraud, drug offense);
- The relationship between the crime and the proposed job duties;
- The extent and nature of the person's past criminal activity;
- The age of the person when the crime was committed;
- The amount of time that has elapsed since the person's last criminal activity; and
- The conduct and work activity of the person before and after the criminal activity.

Tex. Occ. Code §§ 53.022, .025.

Whether applying state or local eligibility standards, districts should be mindful of the Equal Employment Opportunity Commission's (EEOC) guidance on use of criminal history information, discussed below. For information about the federal guidance on the use of criminal history in employment decisions, see [Frequently Asked Questions about EEOC Guidance on Consideration of Criminal History](#).

Applicants for certain certified and licensed positions are also required to complete a pre-employment affidavit when applying for employment with a school district. This affidavit requires an applicant to disclose whether the applicant has ever been charged with, adjudicated for, or convicted of having an inappropriate relationship with a minor. Tex. Educ. Code § 21.009. For information about the requirements for applicants to fill out pre-employment affidavits, see [Frequently Asked Questions about Pre-Employment Affidavits](#).

**Q. What are the mandatory restrictions on school district employment?**

- A. State law requires a district to refuse to hire or to terminate a person, as applicable, if the person was:
- convicted or placed deferred adjudication community service for an offense requiring registration as a sex offender, or
  - convicted of a felony under Texas Penal Code Title 5 (crimes against the person) if the victim was a under eighteen at the time of the offense.

Tex. Educ. Code § 22.085(a).

The district may make an exception if:

- the offense is more than 30 years old, and
- the person has satisfied the terms of the court order entered on conviction.

Tex. Educ. Code § 22.085(b).

**Q. What employment laws are implicated when considering arrest and conviction records for employment decisions?**

- A. Criminal background checks implicate the employment discrimination laws. In April 2012, the EEOC issued updated guidance regarding the role of arrest and conviction records in employment decisions. EEOC, [Enforcement Guidance on Consideration of Arrest and Conviction Records in Employment Decisions under Title VII of the Civil Rights Act of 1964](#),

Apr. 25, 2012. While the Fifth Circuit Court of Appeals ruled that the guidance is not binding,<sup>2</sup> it is still advisable to analyze an applicant's criminal history on a case-by-case basis, comparing the available information to the requirements of the position.

**Q. *What is the difference between conviction and deferred adjudication?***

- A. *Conviction* is a formal judgment of guilt in a criminal case. A person may be convicted of a crime because a judge or jury found him or her guilty, or because the person pled guilty or no contest (*nolo contendere*) to criminal charges. A person who has been convicted of a crime may be sentenced to prison or may be placed on community supervision (probation).

*Deferred adjudication community supervision* is when the court imposes certain conditions on an offender for a specified period during which criminal proceedings are deferred without an adjudication of guilt. Tex. Code. Crim. Pro. art. 42A.101. If the offender successfully completes community supervision, the judge will dismiss the criminal charges. Tex. Code. Crim. Pro. art. 42A.111.

A common misconception exists that deferred adjudication will not appear on a person's "record" if the person completes community supervision. Criminal history record information from DPS will reflect that charges were filed, the person pled guilty or no contest, and the person received deferred adjudication. The person may ask the court to "expunge"—erase—the offense from his or her record or may seek an order of nondisclosure. Unless and until a court enters an expunction or nondisclosure order, however, the charges will remain on the person's record. Because deferred adjudication requires a guilty or no contest plea, most employers treat deferred adjudication as the equivalent of a conviction.

**Q. *What should a district do if an applicant or employee's criminal record is confusing or incomplete?***

- A. The district may contact DPS's Error Resolution Unit by phone at 512.424.7256 or by e-mail [error.resolution@dps.texas.gov](mailto:error.resolution@dps.texas.gov) for assistance interpreting records or with incomplete records. DPS may then contact the prosecutor, court, or law enforcement agency who originally reported a criminal history to obtain clarification or an update.

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<sup>2</sup> *Texas v. Equal Employment Opportunity Comm'n*, 2019 WL 3559629 (5th Cir. 2019) (enjoining the EEOC from enforcing the guidance on criminal records).

## CONFIDENTIALITY OF CRIMINAL HISTORY RECORDS

**Q: *Are criminal history records public information?***

- A. Criminal histories obtained from DPS are confidential. Tex. Gov't Code § 411.097. A district may disclose or use a criminal history only to the extent authorized or directed by statute, rule, or court order. Thus, criminal histories are not subject to disclosure under Texas Government Code chapter 552 (Public Information Act). Moreover, a district may not release a criminal history, to any person except the individual who is the subject of the information, TEA, SBEC, or by court order.

Nevertheless, if a district receives a request for information that is confidential by law, the district must follow statutory procedures to obtain permission to withhold the information. Thus, if a district receives a public information request relating to criminal histories, the district must seek a ruling from the attorney general as provided by statute. See TASB Policy GBAA(LEGAL).

**Q. *May a district disclose information from a criminal history record to persons who are not authorized to access the criminal history clearinghouse?***

- A. No. Only persons authorized by DPS may access criminal history records. Tex. Gov't Code § 411.097. The law protects the actual information, not just the paper document printed from the clearinghouse. *Criminal history record information* refers to the information, in whole or in part, in its original form or any subsequent form or use. For example, information from a criminal history record continues to be protected after it is copied into a spreadsheet and combined with other information.

Finally, even the fact that a person has a criminal history is confidential. An authorized district employee may not disclose information that could reveal the identity of a person about whom a record was requested or information that directly or indirectly indicates or implies that the person was involved in the criminal justice system. The authorized district employee may not confirm the existence or nonexistence of a criminal history record to any person who is not eligible to receive the information, even if that person is another district employee with a good faith business purpose for accessing the information. Tex. Gov't Code § 411.084.

**Q. *May a district disclose criminal history information it obtains from DPS' public Website?***

- A. Yes. The principles discussed above apply only to a criminal history obtained from the FACT clearinghouse or DPS's name-based database. The rules do not apply to a criminal history obtained from public sources. Thus, information obtained from the public portions of DPS's Website—such as the sex offender registry—is public information and may be shared with anyone.



**Q. Who is allowed to access criminal history records?**

- A. Only persons authorized by DPS may access criminal history records. Thus, an administrator who has not been authorized by DPS to view the information in the clearinghouse may not see the criminal history of an applicant for a position on his or her campus, or be told whether the applicant has been involved in the criminal justice system. Similarly, an authorized user may not inform the board of trustees of the criminal history of an applicant or employee unless and until each board member obtains appropriate authorization.

**Q. What procedures should be in place to protect access to criminal history records?**

- A. Districts must maintain compliance with the FBI Criminal Justice Information Services (CJIS) Security Policy. Districts shall allow DPS and the FBI to conduct audits of their clearinghouse accounts to prevent any unauthorized access, use, or dissemination of information. 17 Tex. Admin. Code § 27.171, .172(8), .174. According to the CJIS Security Policy, school districts must have procedures in place addressing personnel sanctions, controlling access to hardware and media, incident response, digital media sanitation and disposal, and media protection. The procedures are described in the FBI's [Criminal Justice Information Services \(CJIS\) Security Policy](#). Sample resources are available at the [Texas DPS CJIS Launch Pad](#).

**Q. May a district provide an employee with a copy of his or her criminal history record information from DPS?**

- A. Yes. State law provides that an employee may request from the district a copy of any criminal history record information related to that employee that the district has obtained from DPS. Tex. Gov't Code § 411.097(d). DPS interprets this statute as conveying discretionary authority on a district: A district may grant or deny the employee's request. If the district chooses to deny the request, the district may refer the individual to DPS to obtain a copy of his or her criminal history record. A district may charge a fee to provide an employee with a copy of his or her criminal history, not to exceed the actual cost of copying the record. Tex. Gov't Code § 411.097(f).

DPS advises districts to reveal to an employee only the results of a fingerprint-based search, not the results of a name-based search. DPS advises districts not to release a copy of a state criminal history record to an individual because of the risk of mistaken identity.

**Q. What is the penalty for obtaining unauthorized access to criminal history records?**

- A. Unauthorized access is subject to criminal penalties. A person commits an offense if the person knowingly or intentionally obtains criminal history record information in an unauthorized manner, uses the information for an unauthorized purpose, or discloses the information to a person who is not entitled to the information. The offense is a Class B misdemeanor, unless the person obtained the information for remuneration, in which cases it is a second degree felony. Tex. Gov't Code § 411.085.

In addition, authorized employees are protected from retaliation for refusing to provide unauthorized access. Texas law recognizes an exception to the employment at-will doctrine where an employee is terminated for refusing to perform an illegal act. *Sabine Pilot Serv., Inc. v. Hauck*, 687 S.W.2d 733 (Tex. 1985).

**Q. How long may a district maintain criminal history records?**

- A. Not very long. A district must destroy a criminal history record obtained from DPS on the earlier of the date the information is used for the authorized purpose or the first anniversary of the date the information was originally obtained. Tex. Gov't Code § 411.097(d)(3). For example, if a district prints an applicant's criminal history, the district must destroy that document as soon as a decision is made as to whether to hire the applicant. If the district has not made a decision after one year, the district must destroy the criminal history at that time.

Similarly, a district must destroy information it collects in order to obtain a criminal history record—including the person's name, address, phone number, social security number, driver's license number, other identification number, and fingerprint records—not later than the first anniversary of the date the information is received. Tex. Educ. Code § 22.08391.

**Q. Where can I find more information about mandatory criminal history record checks?**

- A. For information on the FACT clearinghouse and other DPS databases, districts should contact DPS' Access and Dissemination Bureau at 512.424.2365 or [fingerprint.services@txdps.state.texas.us](mailto:fingerprint.services@txdps.state.texas.us).

School district representatives can contact TASB Legal Services at 800.580.5345 or [legal@tasb.org](mailto:legal@tasb.org) for general guidance on complying with the statute. For in-depth issues, districts should contact their local attorneys.

This document is continually updated, and references to online resources are hyperlinked, at [https://www.tasb.org/Services/Legal-Services/TASB-School-Law-eSource/Personnel/documents/crim\\_hist\\_district\\_employees.pdf](https://www.tasb.org/Services/Legal-Services/TASB-School-Law-eSource/Personnel/documents/crim_hist_district_employees.pdf). For more information on this and other school law topics, visit TASB School Law eSource at [schoolawesource.tasb.org](http://schoolawesource.tasb.org).

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